



Growing tribal economies • Strengthening tribal finance

1101 30TH STREET, NW, SUITE 500 • WASHINGTON

February 16, 2021

Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW
Washington, DC 20551

Re: Community Reinvestment Act Regulations - Docket No. R-1723, RIN 7100-AF94

Dear Secretary Misback,

In representing the economic interests of over one hundred-twenty tribal governments, NAFOA has a clear mission to strengthen tribal finance and grow tribal government economies through advocating for effective economic policy solutions. In furtherance of our mission, we welcome the opportunity to comment on the Advanced Notice of Proposed Rulemaking (ANPR) issued by the Board of Governors of the Federal Reserve System (the Board) requesting feedback on the proposed Community Reinvestment Act (CRA) regulations (Docket No. R-1723, RIN 7100-AF94). NAFOA is supportive of the Board's efforts to modernize the CRA.

The CRA is intended to encourage depository institutions to help meet the credit needs of the communities in which they operate, including low- and moderate-income (LMI) neighborhoods. The aims of the CRA are incredibly important. However, it needs to be changed to include populations, such as Indian Country, that have been systematically excluded and underserved during the entirety of the Act. The change also needs to reflect modern banking advancements that have occurred since it was last updated, over 25 years ago.

While the CRA has provided meaningful community support in some areas of the country among select underserved populations, Indian Country has been left behind. It cannot be overstated under the current regulatory scheme, the CRA does not and never has worked for Indian Country despite Native communities being among the most underserved and underbanked populations in the country with the largest housing shortages and highest poverty rates in the country. The Board's proposed approach to modernize the CRA provides an opportunity for Indian Country, and other underserved communities who have been historically left out of the scope of the act, to finally be included. The Office of the Comptroller or Currency (OCC)'s recent Final Rule modernizing the CRA released last May addressed many of the banking needs of Indian Country and other underserved communities in significant ways. We encourage the Board to incorporate the Indian Country specific elements and inclusive spirit from the OCC's Final Rule. The elements include maintaining meaningful incentives that allow Indian Country to be part of any bank's assessment area regardless of location and a multiplier to a financial institution's exam score for activities conducted within Indian Country.

NAFOA has been actively working with the Board, the OCC, tribal governments, and institutions serving Indian Country over the past three years conducting broad outreach to develop recommendations for updated regulations. NAFOA encourages the Board to adopt an approach that upholds the overdue inclusion of Indian Country as an affirmative obligation. To achieve this, NAFOA's recommendations center around a few themes:

- Ensure Indian Country is consulted in any conversation or attempt to influence the flow of capital and financial services into LMI tribal communities.
- Ensure any new regulations be inclusive of individual Indians who need access to personal and business financial services.
- Be inclusive of tribal governments which have large scale critical capital needs that are essential to growing their economies, creating economic opportunities, and providing services.
- Allow and encourage CRA credit that follows and supplements federal programs.
- Require Indian Country be a part of the scoring system, with robust incentives or scoring that compel bank participation.
- Penalize institutions who choose not to meaningfully engage with Indian Country.
- Expand qualifying activities that can creatively meet unique and changing community needs.

With these Indian Country priorities addressed, NAFOA believes the Board can meet this affirmative obligation to help the CRA incentivize capital and investments to Native communities while helping all LMI communities that have previously been served.

Indian Country Background:

It is an understatement to claim Indian Country has been left behind by the CRA over the past four decades. The idea of providing adequate and fair access to financial services by expanding branch networks and through other means of passive encouragement has not worked and will not work for Indian Country. An alignment of a banking and credit deserts map with a map of tribal communities reveals a crisis for tribal citizens and governments attempting to access cost effective capital and banking services. Research from the Center for Indian Country Development within the Minneapolis Federal Reserve Bank reveals Indian communities are unable to reasonably access basic capital services.¹ A report conducted in 2016 by the Department of Treasury shows Native communities improving but still generations away from achieving parity with other populations.² This means an improved CRA that specifically addresses unique tribal needs has the potential to move Indian Country away from occupying the unenviable status of being the most underserved and underbanked population in the nation.

Indian Country has been shaped by federal policies that make it more difficult for capital markets to serve both individual Indians and tribal government needs. For individuals Indians, mortgages are

¹ Mapping Native American Financial Institutions, Minneapolis Federal Reserve Bank, Center for Indian Country Development, <https://www.minneapolisfed.org/indiancountry/resources/mapping-native-banks>

² Access to Capital and Credit in Native Communities, Miriam Jorgensen, University of Arizona, Native Nations Institute, 2016 - <http://nni.arizona.edu/publications-resources/publications/papers/2016/access-capital-and-creditnative-communities> with accompanying data set

difficult to underwrite because housing valuations and a cumbersome federal appraisal process on trust lands means approval times are up to six times longer than the rest of America and few lenders want to bear the added costs. For those that have secured mortgages or own a home on trust lands, equity loans are difficult to secure with lenders who are reluctant to collateralize reservation properties for similar reasons. The inability to leverage value and property, which is the largest asset for most Americans, has the very real impact of removing the most common form of business and wealth creators for Native Americans. Too often the solution and implied incentive for Native Americans is to secure property off reservation which restricts community and economic development on reservations. This issue can be addressed through creative lending that pairs existing federal programs with a strong tribal government role to create housing developments which accommodate the housing needs of tribal citizens.

Tribal governments often have difficulty securing suitable capital including access to credits and government debt for community and economic development. Doing business with Indian Country is difficult for banks – it requires familiarity with a different set of regulations and land ownership, working with tribal governments, and often has higher costs due to lack of broadband or basic infrastructure. In the Board’s Center for Indian Country Development Listening Session on the CRA and access to capital on January 21, 2021, tribal leaders reiterated time and again that financial institutions do not want to work with tribes, and they must be actively pushed to work with Native communities; they will not wade into these waters voluntarily. The CRA regulations must very intentionally include Indian Country and encourage banks to develop meaningful relationships with tribes by providing both carrots and sticks to spur partnerships and investments. Banks should get extra credit for activities within Indian Country, with a multiplier or impact score, and if they want an “outstanding” or any high rating they should be required to perform qualifying activities within Indian Country. An updated CRA can make a significant difference in the way banks interact with Indian Country and these types of investments are necessary for improving the quality of life in these communities.

The COVID-19 pandemic has only exacerbated the credit and capital challenges within Indian Country. The lack of adequate broadband, access to clean water, limited and outdated infrastructure, overcrowded housing, and lack of health facility funding have all helped lead Native Americans to suffer some of the worst health consequences of the pandemic. To add insult to injury, Indian Country has suffered some of the worst economic consequences as well; the closure of virtually all tribal businesses has left tribal governments without their sole revenue source to provide basic services for their tribal members. The CRA modernization effort cannot be expected to solve all the discrepancies faced by Native Americans, however, the potential is clear; much suffering could have been prevented had the CRA been a viable channel for Indian Country to access community development dollars over the past 40 years.

Recommendations Defining Indian Country:

While these questions were not specifically asked within the ANPR, we believe it is first important to understand what NAFOA recommends “Indian Country” entail for the purpose of the CRA.

1. Geographic Basis of Indian Country

- The CRA credits should be applied to those banks that lend, invest, provide financial services, or other included activities to those projects that are included in or serve any federally recognized tribe as included in the U.S. Census designations of; Tribal Census Tracts (Tribal Tracts), Oklahoma Tribal Statistical Areas (OTSAs), Tribal-Designated Statistical Areas (TDSAs), Alaska Native Village Statistical Areas (ANVSAs),
- For purposes of continued inclusion, we are requesting that Hawaiian Home Lands (HHLs); and State Designated Tribal Statistical Areas (SDTSAs) be considered as well, however, remain distinct from the federal designation of Indian Country included above.
- The designations should be used to determine LMI eligibility, geographically tied activities and designations, and the total service areas for the governments and qualifying native communities.

2. *Qualifying CRA activities and entities eligibility*

- Qualifying CRA credit activities should include support for entities and consortia whose activities directly serve Indian Country for similar financial services and community development activities including those that;
 - Are supporting organizations to include, but not limited to: associations providing similar financial, business, or economic activities; Native and other CDFIs that primarily serve Indian Country; and Alaska Native Corporations and their subsidiaries as included in ANCSA³ that provide similar activities supported for CRA credit.
 - Are eligible established tribal consortia formed for the purpose of carrying out aggregated programs and services including but not limited to housing, healthcare, and financial services.
- CRA activities should be tied to a targeted population or government. Some tribes have broad service areas, and some have extremely limited areas. The CRA activities should include those activities on or near the geographically defined tracts that have obvious or demonstrated support from the tribal or native entities serving the needs of those in the qualifying census tracts. For example, Oklahoma tribes have broad service areas. Not every project within those areas will be tied to the tribes but may seek credit. We would request consideration for credit that is obvious (government funded projects) or demonstrated (tribal authorization or a tribally support program). In addition, for further clarification, projects that may be located outside of an area but primarily services one or more tribes or villages should be considered as eligible. For example, Native villages may want to use a common health facility or Pueblos may want to utilize a shared wastewater facility.

³ Alaska Native Claims Settlement Act of 1971 (P.L. 92-203) (ANCSA) (43 U.S.C. 1601 et seq.)

ANPR Questions:

Our answers to specific questions will be discussed in further detail below, but there are several overall priorities we want to express:

- Indian Country should be in every bank's assessment area for both retail lending and community development activities regardless of location.
- Depending on the approach the Board eventually decides on to rate the quality of qualifying Community Development activities, activities within Indian Country should receive a significant multiplier or higher impact score than any other qualifying activities.
- Meaningful incentives to for financial institutions to develop partnerships with Indian Country are crucial to the success of any effort to increase financial access in Indian Country.
- Financial institutions should be required to perform qualifying activities in Indian Country to receive a rating of "outstanding."
- Indian Country needs enhanced incentives. While these suggestions may appear overly aggressive in asking for special treatment, they are not. Banking in Indian Country is more difficult than any other part of the country, including the other designated areas of high need. If a bank has a choice between a Community Development activity that will earn it an impact score of 3 (the highest score) outside of Indian Country and an activity that will earn them the same highest score within Indian Country, the other activity will be chosen every time.

Question 40. Should CRA consideration be given for retail lending activities conducted within Indian Country regardless of whether those activities are located in the bank's assessment area(s)?

Yes. CRA consideration should be given for all retail lending and community development activities conducted within Indian Country regardless of whether those activities are located within a bank's assessment area(s). Indian Country is a unique and especially challenging geographic area that will require intentional targeted inclusion in the modernized CRA to increase CRA activities in these areas. Indian Country has the most underbanked and underserved populations in the nation, CRA investments are not reaching native communities because existing bank branches are scarce and doing business with Indian Country requires more patience, perceived risk, and innovation than other LMI and underserved areas.

Allowing all CRA activities within Indian Country to count for all banks could give Indian Country and other distressed areas an influx of capital and services that they so desperately need from banks that are operating in hot spots. This could tremendously increase the total impact of CRA dollars nationwide. Much of the reason Indian Country has not been served by the CRA historically is because Indian Country is often located within a banking desert with very few physical branches; currently, too much of Indian Country often does not fall within any financial institution's assessment area.

To better serve LMI populations nationwide and reflect the banking realities of today, the updated regulations must move away from the physical branch model and allow for CRA credit to count for capital flow into Indian Country and other distressed areas that the law always intended to serve but were unintentionally left behind.

Banks will require further incentives beyond simply engaging with Indian Country, but allowing activities conducted in these areas of high need is the necessary first step.

Question 41. Should all retail lending activities in Indian Country be eligible for consideration in the Retail Lending Subtest or should there be limitations or exclusions for certain retail activities?

Yes. All retail lending activities within Indian Country should be eligible for consideration in the Retail Lending Subtest.

Question 47: Should the Board use impact scores for qualitative considerations in the Community Development Financing Subtest? What supplementary metrics would help examiners evaluate the impact and responsiveness of community development financing activities?

We support the use of Impact Scores as a qualitative measure for the Community Development Financing Subtest that give higher scores for responsiveness, complexity, and innovation and agree that this may be less complex than utilizing multipliers. We support giving a score to each CD loan or investment and averaging them overall to determine the institution's final score. While the suggested 1-3 range of scores should be considered for all normal activities within a bank's assessment area, we support extra credit for activities in hard-to-reach areas, like Indian Country. For example, we would propose a score of 4 for activities in all other designated areas of need, and a score of 5 for Indian Country activities due to their increased difficulty.

As mentioned above, financing a project in Indian Country has a completely unique set of barriers to entry due to land ownership, tax status, and other constraints that are largely out of Indian Country's control. Allowing banks to receive credit for working in Indian Country alone will not be effective, however, by including extra credit in the form of an enhanced impact score, banks may have the incentive needed for consideration.

Question 64. Would providing CRA credit at the institution level for investments in MDIs, women-owned financial institutions, and low-income credit unions that are outside of assessment areas or eligible states or regions provide increased incentives to invest in these mission-oriented institutions? Would designating these investments as a factor for an "outstanding" rating provide appropriate incentives?

Yes, however we believe this category should also include Indian Country and institutions serving Indian Country, and institutions **must** meaningfully invest in this category (MDIs, women-owned financial institutions, low-income credit unions, Indian Country, Native CDFIs, and other Native-serving entities) in order to receive a rating of "outstanding." There absolutely needs to be a deterrent for a bank ignoring an entire population or distressed area. The idea of addressing distressed areas only works when a majority of banks are participating and disbursing risk. Having a deterrent only makes the system work better. Supporting lending and investment activities in those

Native institutions will be the most effective way for many banks to meet the proposed CRA obligations. These institutions are familiar with many of the obstacles and challenges that are a part of lending and investing in Indian Country.

Question 67. Should banks receive CRA consideration for loans, investments, or services in conjunction with a CDFI operating anywhere in the country?

Banks should receive CRA consideration for loans, investments, or services in conjunction with Native CDFIs and other Native-serving entities operating anywhere in the country that predominantly serve Indian Country. Within the current banking landscape, CDFIs and other intermediaries are the institutions most familiar with Indian Country. As previously mentioned, larger banks are reluctant to learn the intricacies of Indian Country, however they should have every incentive to direct the flow of capital into Native communities. CDFIs are the institutions most familiar with tribes and tribal governments, however, they often lack the appropriate resources to serve the financial needs of the communities. By encouraging partnerships between larger banks and CDFIs, all parties benefit – larger institutions can benefit from CDFI knowledge of Indian Country, CDFIs can benefit from the resources of larger institutions, and Indian Country can receive targeted banking services.

Question 69. Should the Board expand the geographic areas for community development activities to include designated areas of need? Should activities within designated areas of need that are also in a bank's assessment area(s) or eligible states and territories be considered particularly responsive?

Yes. The Board should expand geographic areas for community development activities to include designated areas of need, and all of Indian Country should remain one of these areas as should other areas of persistent distress. Incentives such as these are crucial tools to encourage investments in areas, like Indian Country, that currently have the most need and highest difficulty getting those needs met.

Question 70. In addition to the potential designated areas of need identified above, are there other areas that should be designated to encourage access to credit for underserved or economically distressed minority communities?

We believe the designated areas identified in the ANPR are appropriate, however we would like to see even more incentives to address Indian Country needs. We believe activities conducted in these areas should also receive a multiplier or enhanced impact score in their rating. Allowance of these activities alone is not enough to incentivize banks to perform activities that are more time consuming or difficult. Financial institutions need robust incentives to take on new markets and populations.

Question 71. Would an illustrative, but non-exhaustive, list of CRA eligible activities provide greater clarity on activities that count for CRA purposes? How should such a list be developed and published, and how frequently should it be amended?

In the current regulatory framework, it is difficult for banks to determine what types of activities qualify for CRA credit and it can take years to get a final determination. This disincentivizes innovative deals and partnerships by creating uncertainty. One of the main priorities of the Board in modernizing the CRA should be creating more certainty around qualifying activities.

To that end, yes, we support an illustrative non-exhaustive list of CRA eligible activities, like the approach taken by the OCC, that would provide greater clarity on activities that count for CRA purposes. The list should be updated at least once a year, and there should be a process to determine if an activity counts in a timely manner. This list is a critical learning tool for financial institutions new to Indian Country because Indian Country is different, and the activities performed in Indian Country will be structured differently than CRA activities performed elsewhere. If the new regulations hold financial institutions to an affirmative obligation to perform CRA activities in Indian Country, they will require guidance to understand how they can meaningfully meet their obligation.

To further illustrate this point, some of the most impactful projects for community development in Indian Country require complex deals involving multiple partners and funding mechanisms. These complicated structures are a necessity based on different tribal laws, land status, regulations, and ownership structures that make ventures in Indian Country different than other LMI areas. Banks reviewing these complex deals will be more likely to engage in these types of activities if they know it will qualify or have a timely way to check.

Additionally, and crucially, the federal government plays an outsized role in ensuring capital flows into Indian Country. Federal programs geared toward Indian Country accommodate tribal structures and challenges and can provide additional leverage, security, or capital for projects. This is unique to Indian Country, if we want banks to follow these federal programs, guidance on how to do that would only help. It is crucial that the banks are provided with guidance on how to participate in these projects that follow these federal programs. An illustrative list of activities must include these types of projects.

Though we prefer the approach of developing an illustrative non-exhaustive list, we are also open to the alternative approach suggested by NCRC of a principles-based list to keep it manageable and understandable, assuming this list is carefully crafted to truly enhance the certainty of eligible activities for financial institutions. If a principles-based list approach is chosen, for the reasons listed above, it must be accompanied by a concurrent effort to develop a regularly updated database that includes examples of eligible activities. The purpose of this list is to ameliorate the current unclear status of projects likely to be eligible, either approach could provide financial institutions with more assurance that innovative and complex activities would qualify.

In either approach, we would like the list to include language that makes it clear to financial institutions that activities within Indian Country are a priority, and that efforts by a financial institution undertaken in earnest to meet the needs of Native American individuals, businesses, partnerships, governments, and infrastructure will likely be eligible.

Question 88. Should consideration for an “outstanding” rating prompted by an investment or other activity in MDIs, women-owned financial institutions, and low-income credit unions be contingent upon the bank at least falling within the “satisfactory” range of performance?

Yes. It is important that banks fall within the “satisfactory” range of performance before receiving a “outstanding” rating for activities outside of their assessment areas. While we encourage every effort to provide incentives for investment in Indian Country and other areas of high need, we want financial institutions to still be responsive to the needs of their communities. Allowing an institution to receive consideration for an “outstanding” without reaching “satisfactory” could result in ratings inflation and move too far away from the original intent of the CRA.

As mentioned in our answer to question 64, we believe these types of investments should be required for an institution to be considered for an “outstanding” rating, and this category should be broadened to also include Indian Country, Native CDFIs, and other Native serving entities.

Question 89. Would it be helpful to provide greater detail on the types and level of activities with MDIs, women-owned financial institutions, and low-income credit unions necessary to elevate a “satisfactory” rating to “outstanding”?


Yes, this incentive could be very powerful, however, it will have to be carefully crafted to ensure credit is given to institutions who are performing meaningful CRA activities in the hardest banking environments in the country while not letting them shirk their existing obligations or inflate their ratings. The types and level of activities must provide meaningful support to communities in need and active engagement from financial institutions should be rewarded. Details on the types and levels of activities are key to determining the success of this incentive.

As mentioned in our answer to question 64 and 88, we believe these investments should be required for an institution to be considered for an “outstanding” rating, and this category should be broadened to also include Indian Country, Native CDFIs, and Native serving entities.

Conclusion

We are supportive of the Federal Reserve Board’s efforts to clarify and modernize the CRA so that it works for all underserved and underbanked communities. The CRA needs to be updated so it clarifies what counts, redefines assessment areas, and both incentivizes and obligates activities performed in the areas of highest need. The ANPR by the Board indicates that the new rule can address these priorities and enable populations that have been left out from the start, like Indian Country, to finally participate.

Sincerely,

A handwritten signature in black ink, appearing to read "Dante Desiderio".

Dante Desiderio
Executive Director
NAFOA